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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 257

NELLIE LOUISE CARSON,
Petitioner in Certiorari,

versus

UNITED STATES OF AMERICA,
Respondent.

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES

No.

NELLIE LOUISE CARSON,
Petitioner in Certiorari,

versus

UNITED STATES OF AMERICA

Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit

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Comes NELLIE LOUISE CARSON, Petitioner in certiorari, and petitions this Honorable Court for the Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

SUMMARY
and
SHORT STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted February 12, 1963 and convicted on March 12, 1963, in the United States District Court for the Southern District of Georgia, for violation of Section 472, Title 18, U. S. Code Annotated on three charges of possessing counterfeit money, and was sentenced to serve

one year on each of such counts, consecutively, for a total of three years.

On December 18, 1962, during Christmas rush, counterfeit bills (referred to herein as Counterfeit Set 1) were passed in a shopping center in Brunswick, Georgia. On December 19, 1963, Secret Service Agent Kiljian, in charge of the investigation in connection with these counterfeit bills, talked with the clerks who had accepted them, and allegedly took down their description of the person passing them.

On January 12, 1963, Agent Kiljian swore out warrants to search premises of and to arrest one J. B. Pritchard. When he went to arrest Pritchard at the Amvets Club in Griffin, Georgia, he had "already received information prior to this that Nellie Louise Carson was the woman who was down here in Brunswick with who had passed these bills. When I saw her [for the first time on January 12, 1963] she fit the description [i.e., that allegedly se ured on December 19, 1962 from the clerks in the Brunswick shopping center] to a T." (Tr. 61)

At the Amvets Club, petitioner was arested about 8:00 PM by local officers who had accompanied Kiljian there, and was taken to and confined in Spalding County Jail on charges of disorderly conduct.

Around midnight, when Agent Kiljian arrived at the County Jail with Pritchard to have him confined pending arraignment on Federal charges, Kiljian talked with petitioner. Petitioner asked Kiljian what she was being held for; Kiljian said he did not know, that "it was up to the sheriff, for I could not have her arrested," nevertheless he asked her "if she would mind if we would search her home."

He testified (Tr 62) "Had she denied that consent we would have taken other, legal means."

The question whether petitioner did give her consent to such search is in conflict in the record; petitioner denies having given it, Agent Kiljian affirms it, but see Kiljian's statement (Tr 62) on "fast moving investigation" and see also the testimony of Eady (Tr 149-155) as to the conduct of Federal Officers during the search. The trial court observed, when petitioner was tried for passing the bills in Counterfeit Set 1, that she could not have given consent to such a search while she was under restraint by any law enforcement officers. No warrant was ever secured to search her home, but Agent Kiljian did proceed to search petitioner's home, where allegedly counterfeit bills (referred to herein as Counterfeit Set 2) were discovered. Petitioner was thereupon, four hours after her first arrest, released by the Spalding County Sheriff to and placed in Federal Custody, on the basis of evidence obtained during the search of her home, removed to Atlanta, interrogated at length, forced to pose for photographs by Secret Service Agents, who used a Polaroid Camera, and then, and only after demand by Counsel for Petitioner, at 3:00 PM on January 13, 1963, arraigned in Gainsville, Hall County, Georgia, 92 miles, four U. S. Commissioners and 19 hours distant from her first (disorderly conduct) arrest, on charges of possessing Counterfeit Set 2.

Agent Kiljian later returned to Brunswick in connection with Counterfeit Set 1. He took with him, (a) the polaroid photographs of petitioner taken while she was detained before her arraignment, and over her objections, following her arrest, and (b) a sweater and other items taken from petitioner's home during the search, and allegedly similar to merchandise purchased with the bills in

Counterfeit Set 1. These items were shown to the clerks in the Brunswick Shopping Center, and they were told that the merchandise had been taken from petitioner's home along with Counterfeit Set 2, and were shown the photographs of petitioner, and of no other person, and doubtless were told that the photographs were of petitioner.

The admitted purpose of this display by Agent Kiljian was to firm up the testimony of the witnesses for prosecution in connection with Counterfeit Set 1.

Only after the testimony had thus been "firmed up" were these witnesses taken before the Grand Jury. Only on the basis of the witnesses "firmed up" testimony was petitioner indicted.

No identification of petitioner in connection with the passing of Counterfeit Set 1 was presented to the trial jury, other than identification "firmed up" by the use of photographs and other items by Agent Kiljian.

Only with this "firmed up" testimony was she convicted.

Petitioner has never been (and in all likelihood never will be) tried on the charge of possessing Counterfeit Set 2, nor on the disorderly conduct charge for which she was allegedly first placed under arrest by local officers.

Prior to, during, and at the conclusion of the jury trial, counsel for petitioner made numerous oral and written motions on the Constitutional grounds, for suppression of the evidence on which petitioner was finally convicted. On each occasion the motion was overruled.

From her conviction in the District Court for the Southern District of Georgia, petitioner filed her appeal in the United States Court of Appeals for the Fifth Circuit; her conviction was affirmed, and thereafter a motion for rehearing was denied. To secure a review of this affirmance, petitioner brings this Petition for the Writ of Certiorari.

There is no dispute as to the facts; counsel for the United States, in the Government's Brief to the Circuit Court of Appeals, agreed with the substance of the statement of facts set forth above.

In affirming petitioners conviction, the Circuit Court of Appeals cited *U. S. v Iacullo* (1955 7 Cir) 226 F2d 788, and *U. S. v Amorosa* (1948, 3 Cir) 167 F2d 596, and denying the motion for rehearing, erroneously held that the District Court had found the search had been rendered legal by the consent of petitioner (cf Tr 136).

JURISDICTION

(a) The judgment of the Court of Appeals for the Fifth Circuit was entered April 1, 1964. Petitioner's Motion for Rehearing was denied June 5, 1964. The Jurisdiction of the Supreme Court of the United States is invoked under 28 USC 1254 by virtue of 18 USC 3772, within the time prescribed in Rule 22 of the Revised Rules of Practice and Procedure adopted April 12, 1954.

(b) The Constitutional Provisions and portions of the Federal Rules of Criminal Procedure which are involved in this petition for certiorari are as follows:

UNITED STATES CONSTITUTION Amendment IV

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CONSTITUTION Amendment V

"No person shall be held for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the some offense to be twice put in jeopardy of life of limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FEDERAL RULES OF CRIMINAL PROCEDURE

(5 FRD 539 ff)

"Rule 5. Proceedings before the Commissioner

"(a) APPEARANCE BEFORE THE COMMISSIONER. An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay

before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.

"(b) STATEMENT BY THE COMMISSIONER. The commissioner shall inform the defendant of the complaint against him and of his right to have a preliminary examination. He shall also inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The commissioner shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided in these rules.

"(c) PRELIMINARY EXAMINATION. The defendant shall not be called upon to plead. If the defendant waives preliminary examination, the commissioner shall forthwith hold him to answer in the district court. If the defendant does not waive examination, the commissioner shall hear the evidence within a reasonable time. The defendant may cross examine witnesses against him and may introduce evidence in his own behalf. Of from the evidence it appears to the commissioner that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the commissioner shall forthwith hold him to answer in the district court; otherwise the commissioner shall discharge him. The commissioner shall admit the defendant to bail as provided in these rules. After concluding the

proceeding the commissioner shall transmit forthwith to the clerk of the district court all papers in the proceedings and any bail taken by him." Id. at 547, 548.

"RULE 41.

"(e) MOTION FOR THE RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE.

"A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before the trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing." Id. at 571.

(c) The Circuit Court of Appeals for the Fifth Circuit, in handing down its judgment on petitioner's appeal, and on her motion for rehearing, has decided important questions of Federal law which have not been, but should be, settled by this Court; has so far departed from the accepted course of judicial supervision of federal law enforcement as to call for exercise of this Court's power of supervision; and has by implication approved an investigative technique which clearly vitiates the effect of Rule 5 a and Rule 41 (e) of the Federal Rules of Criminal Procedure, violating the procedural and substantive due process guarantees of the Constitution of the United States, in that said Court of Appeals for the Fifth Circuit:

(1) Overlooked the decision of the Supreme Court of the United States in the matter of *Rea v U.S.*, 350 US 214, with respect to the supervision of federal law enforcement officers by the Supreme Court of the United States.

(2) Held in conflict with its own decision in the matter of *Ray vs U. S.*, 84 F. 2d 654, 656 with respect to consent to search and waiver of constitutional rights under the Fourth Amendment to the Constitution of the United States, by persons under detention;

(3) Held in conflict with the decision of the U. S. Court of Appeals for the District of Columbia in the matter of *Bynum vs U. S.*, 262 F 2d 465, respecting admissibility of evidence obtained during unlawful detention, on Motion to Suppress brought under Rule 41 (e), Federal Rules of Criminal Procedure;

(4) Held in conflict with the clearly implied meaning of the decision of the U. S. Court of Appeals for the

Second Circuit in the matter of *U. S. vs Klapholz*, 230 F 2d 494, respecting admissibility of (testimony flowing from use of) evidence obtained prior to arraignment and during illegal delay following arrest, when that decision is read in conjunction with the "poisoned tree" doctrine of *Nardone vs. U. S.*, 308 U.S. 338 as extended in *Goldstein vs U.S.*, 316 U.S. 114, to the indirect use of evidence illegally obtained.

(5) Held in conflict with the clearly implied meaning of the decision of the U.S. Court of Appeals for the Seventh Circuit in the matter of *U.S. vs Iacullo*, 226 F2d 788, and the decision of the U.S. Court of Appeals for the Third Circuit in the matter of *U.S. vs Amorosa*, 167 F2d 596.

(d) This petition for certiorari is being filed in this Court within 30 days from the date of reckoning provided in the stay of mandate on the judgment denying petitioner's motion for rehearing.

(e) The nature of the case and the rulings of the Court were such as to bring this case within the jurisdictional provisions relied on, and the grounds upon which it is contended that the questions involved are substantial, are as follows:

(1) The United States Court of Appeals for the Fifth Circuit has here decided an important question of law respecting procedural and substantive due process, which has been decided to the contrary by the United States Courts of Appeals for other Circuits.

(2) The United States Court of Appeals for the Fifth Circuit has failed to take cognizance of the decisions

of this Court respecting the use of illegally obtained evidence and has, by its ruling, permitted testimony thoroughly fouled with the use of such evidence, to be used to convict, in contravention of the mandate of this Court that the policy of the Fourth Amendment to the Constitution of the United States cannot be circumvented by indirect use of evidence obtaining during and by reason of illegal conduct of federal officers.

(3) The United States Court of Appeals for the Fifth Circuit has held that there is an immediate attenuation of the "reach of the 'fruit of the forbidden tree' doctrine", beyond which, evidence illegally obtained may be used to elicit testimony to convict, contrary to the clear holding of this Court that such evidence "*shall not be used at all*" (in *haec verba*), *Silverthorne Lumber vs U.S.*, 251 U.S. 385, 40 S. Ct. 182.

(4) The United States Court of Appeals for the Fifth Circuit has approved an "investigative technique" for use by federal officers, which can be utilized by such officers to manufacture a case from beginning to end, centered around witnesses suborned with no more than their knowledge of, and obedience to, the majesty of the law, whose testimony might then be used to convict even one of the members of the Court itself.

THE QUESTIONS PRESENTED

1. The United States Court of Appeals for the Fifth Circuit erred in deciding that there was no reversible error in proceedings below, respecting which petitioner's contentions are set forth in her appeal as the errors assigned to the District Court, and arguments

on which are contained in petitioner's brief on appeal (which is being certified up as Supplemental Record by the clerk of the Fifth Circuit Court of Appeals) together with citations of authority therein found.

2. The United States Court of Appeals for the Fifth Circuit erred in its interpretation and application of *U.S. vs Iacullo*, 226 F 2d 788, and *U.S. vs. Amorosa*, 167 F 2d 596, with respect to admissibility of photographs taken as above set forth, while petitioner was being unduly detained after arrest and prior to arraignment. Each of these cases is cited in petitioner's motion for rehearing, and distinguished from the case at bar; in that in the instant case, petitioner objected to the taking of the photographs, made while she was being intensively quizzed at offices of the Secret Service many miles from her home and without benefit of counsel, while in the *Iacullo* case no objection was made by the prisoner to fingerprints taken while he was in custody, and in the *Amorosa* case, pictures used had been rightfully taken. See further in this connection, the decision of the United States Court of Appeals for the Second Circuit in the matter of *U.S. vs Klapholz*, 230 F 2d 494 at 498, where the following ruling is made:

> "But as to evidence obtained in the defendant's home after [the house at which defendant could reasonably have been taken before a Commissioner for arraignment] . . . . does the McNabb rule require the suppression of *all such evidence* or is the rule limited to the suppression *of confessions*? Since the rule was one formulated by the Supreme Court as a deterrent to detentions in violation of Rule

> 5(a), we think that it extends *to all evidence* obtained by federal agents through access to persons while detained in violation of Rule 5 (a). It follows that in the setting of this case the order of suppression was within the scope of the McNabb rule."

3. The United States Court of Appeals for the Fifth Circuit held on petitioner's motion for rehearing.

> "Defendant maintains that the search was illegal but the district court found, and the evidence supports the conclusion, that defendant rendered the search legal by her consent. . . ."

In so holding, the Court erred. There is nothing in the record to support the ruling that "the district court found . . . that defendant rendered the search legal by her consent" other than colorable inference only from the fact that the District Court overruled petitioner's motion to suppress, which inference is vitiated by the observation made by the District Court with respect to the search that

> ". . . if a warrant was issued even by a State Officer [for arrest on unrelated charges and prior to search without search warrant] . . . the person would be under restraint and there would be questionable law, it would not be admissible testimony. . . ." (Tr 136).

The Court of Appeals overlooked the controlling principle of the doctrine of waiver of the Constitutional right to be free from unwarranted searches and

seizures, that coercion is implicit in situations where consent is obtained under color of the badge, and that the government must show that there was no coercion in fact (cf. *U.S. vs Page*, 302 F 2d 81, 83; *Villano vs U.S.*, 310 F 2d 680, 684). The brutality demonstrated by federal officers during their search of petitioner's home upon petitioner's arrival there in custody of the Sheriff, after the search had been under way 15 or 20 minutes, in response to petitioner's demand that the officers produce their search warrant or leave, is more than adequate to give the lie to any factual finding that defendant rendered the search legal by consent. (See Tr., 149-50, 154-156, 164, 72.)

The Court of Appeals for the District of Columbia held, in the matter of *Judd vs U.S.*, 190 F 2d 649 at 651, thus:

> "Searches and seizures made without a proper warrant are generally to be regarded as unreasonable and violative of the Fourth Amendment. True, the obtaining of a warrant may on occasion be waived by the individual; he may give his consent to the search and seizure. But such a consent or waiver must be proved by clear and positive testimony, and it must be established that there was no duress or coercion, actual or implied. The Government must show a consent that is 'unequivocal and specific', 'freely and intelligently given.' Thus 'invitations' to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. A like view has been taken where an officer dis-

plays his badge and declares that he has come to make a search, even where the householder replies 'All right.' A finding of consent in such circumstances has been held to be 'unfounded in reason'. Intimidation and duress are almost necessarily implicit in such situations; if the government alleges their absence, it has the burden of convincing the court that they are in fact absent.

"This burden on the Government is particularly heavy in cases where the individual is under arrest. Non-resistance to the orders or suggestions of the police is not infrequent in such a situation; true consent, free of fear or pressure, is not so readily to be found. In fact, the circumstances of the defendant's plight may be such as to make any claim of actual consent 'not in accordance with human experience', and explainable only on the basis of 'physical or moral compulsion.'" (Citations omitted.)

4. The United States Court of Appeals for the Fifth Circuit held further on petitioner's motion for rehearing,

"During a detention alleged to be illegal, defendant was forced to pose for various photographs in addition to the regular 'mug' shots. Neither the sweater [seized during the search of her apartment] nor the photographs were introduced into evidence at her trial. *Both were shown* to witnesses to 'firm up' their identifications after they had al-

> ready made a positive identification of the defendant. The articles were shown to *every witness who identified and testified against defendant at her trial. . . .*" (Emphasis added.)

(The "positive identification of the defendant" as shown by the record, consisted of descriptions, taken from clerks in a shopping center, of a person who made three or four minor purchases in as many stores during the busiest of Christmas shopping rush.)

In the decision of this Court in the matter of *Nardone vs U.S.*, 308 U.S. 338 at 341, is found the following:

> "If knowledge of (the facts improperly obtained) is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it simply because it is used derivatively."

What the Court of Appeals overlooked in making its finding as set forth above, was the fact that the display of photographs of petitioner, and the sweater taken from her apartment, to "every witness who identified and testified against defendant at her trial" took place before her indictment, and whether these witnesses could have made any identification of petitioner sufficient to support an indictment without use of the photographs (clearly illegal under the *Kalpholz* holding, *supra)* and sweater (seized without authority regardless of the existence or nonexistence of

either search warrant or consent) is not determinable, and hence cannot be held to be beyond the attenuation point of their connection with the "fruit of the forbidden tree'.

5. The Fourth Amendment to the Constitution of the United States contains the following:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ."

The Fifth Amendment to the Constitution contains the following:

> "No person shall be . . . deprived of . . . liberty . . . without due process of law . . "

Implementation of these guarantees is in part effectuated by the Federal Rules of Criminal Procedure, which contains the following:

> "An officer making an arrest under a warrant, or any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the *nearest available* commissioner . . ." (Rule 5(a), emphasis added.)

> "A person aggrieved by an unlawful search and seizure may move the district court . . . to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant . . .

> or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. . . ." (Rule 41(e).)

Petitioner was not taken without unnecessary delay before the nearest available commissioner.

Petitioner was arrested by federal officers at midnight, January 12, 1963, which officers attended a committal (mistranscribed as "mental" in the record — Tr 52) hearing for J. B. Pritchard in Griffin, Georgia, the place of petitioner's arrest, on the morning of January 13, 1963. Petitioner was from Griffin removed to Atlanta, where there are two U.S. commissioners, more distant from Griffin than Newman, where there is also a commissioner. But she was not arraigned until counsel demanded the procedure, and then was taken to Gainesville, still more distant, for arraignment. Her arraignment took place at 3:00 p.m. January 13, 1963, following the photographing and extensive interrogation of petitioner in offices of the Secret Service in Atlanta.

Petitioner contends that both the *delay* provision, and the *nearest commissioner* provisions of Rule 5(a) were breached in the processing of the Government's complaint against her, and that only by reason of the unnecessary delay and unreasonable distance between arrest and arraignment was the Government able to secure the photographs which were later used to 'firm up' testimony which was used to convict her; the refusal by the District Courts to suppress these, and the testimony flowing from their use by Government agents, was a violation of Rule 41(e),

Federal Rules of Criminal Procedure.

Petitioner contends that the violation of Rule 41(e) was a violation of her rights under the Fourth and Fifth Amendments to the Constitution of the United States.

APPENDIX

Petitioner attaches as appendix hereto, a copy of the judgment of the United States Court of Appeals for the Fifth Circuit, together with a copy of its judgment and opinion on her petition for rehearing.

WILLIAM H. MOORE, JR.
and

PAUL L. WAYMAN

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CERTIFICATE

I certify that a copy of the foregoing brief has been served upon opposing counsel of record by placing the same properly addressed in the United States Mail with adequate postage affixed thereto.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1963

No. 20,441

D. C. Docket No. 855-Criminal

NELLIE LOUISE CARSON,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and CARSWELL, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 1, 1964

Issued as Mandate:

APPENDIX B

ORDER DENYING REHEARING

Extract from the Minutes of June 5, 1964

NELLIE LOUISE CARSON,

No. 20441 versus

UNITED STATES OF AMERICA.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NELLIE LOUISE CARSON,
Appellant,

versus No. 20441

UNITED STATES OF AMERICA,
Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellant in the above numbered and entitled cause for a stay of the mandate of this Court therein, to enable appellant to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this Court in said cause be and the same is stayed for a period of thirty days from

June 5, 1964; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from June 5, 1964 there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from June 5, 1964, unless the above-mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ JOHN MINOR WISDOM
United States Circuit Judge.

Dated: (ORIGINAL FILED — JUNE 19, 1964)

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20441

NELLIE LOUISE CARSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(June 5, 1964.)

ON PETITION FOR REHEARING

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM: Defendant was convicted of passing counterfeit money. During a search of her apartment, federal agents seized a sweater which defendant was said to have purchased with a counterfeit bill. Defendant maintains that the search was illegal but the district court found, and the evidence supports the conclusion, that defendant rendered the search legal by her consent. During a

detention alleged to be illegal, defendant was forced to pose for various photographs in addition to the regular "mug" shots. Neither the sweater nor the photographs were introduced into evidence at her trial. Both were shown to witnesses to "firm up" their identifications after they had already made a positive identification of the defendant. The articles were shown to every witness who identified and testified against defendant at her trial.

The reach of the "fruit of the forbidden tree" doctrine (*Silverthorne Lumber Co. v. United States*, 1920, 251 U. S. 385) is not limitless. We hold that even in the photographs were the fruits of an illegal detention, their connection with the evidence introduced at trial is too attenuated to taint it.

The defendant's motion for rehearing is DENIED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 20441

NELLIE LOUISE CARSON,
Appellant,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Southern District of Georgia.

(April 1, 1964.)

Before TUTTLE, Chief Judge, and WISDOM, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM: After a careful study of the record and briefs the Court has concluded that there was no reversible error in the proceedings below. See *United States v. Iacullo*, 7 Cir. 1955, 226 F.2d 788; *United States v. Amorosa*, 3 Cir. 1948, 167 F.2d 596. Judgment is

AFFIRMED.

In the Supreme Court of the United States.

OCTOBER TERM, 1964

No. 257

NELLIE LOUISE CARSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 25; R. 197) is reported at 329 F. 2d 319. Its opinion on the petition for rehearing (Pet. App. 23–24; R. 205–206) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 1, 1964 (Pet. App. 20; R. 198). A petition for rehearing was denied on June 5, 1964 (Pet. App. 21; R. 201–207), and the petition for a writ of certiorari was filed on July 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

740-264—64

QUESTIONS PRESENTED

1. Whether petitioner consented to the search of her house.

2. Whether the conviction should be reversed because photographs shown to witnesses who identified petitioner had been taken during an alleged period of unlawful detention.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Georgia and given consecutive one-year sentences on each of three counts charging the passing of three different counterfeit $20 bills, in violation of 18 U.S.C. 472 (R. 39–41; 180–181). The conviction was affirmed on appeal (Pet. App. 20; R. 198).

On the evening of December 18, 1962, a woman made purchases at the Vogue Shop and two other stores in a shopping center at Brunswick, Georgia, passing three counterfeit $20 bills (R. 75–76, 88–89, 97–98, 105–106). A few days later a Secret Service agent, Killian, talked to the sales girls, each of whom gave a description of the woman (R. 47–49, 82, 94, 101-102, 113).

On the evening of January 12, 1963, Killian and several local officers, armed with a federal search warrant, arrested one Pritchard, petitioner's friend, at the Amvets Club in Griffin, Georgia (R. 49, 59, 66, 67, 68). At this time Killian saw petitioner who "fit to a T" the description of the woman who had passed the counterfeit bills in Brunswick (R. 61, 69). Later petitioner, while in jail on a local charge of disorderly

conduct (R. 55), asked the sheriff for permission to talk to a federal agent. Killian spoke with her (R. 58, 68). When petitioner asked why she was being held, Killian answered that he did not know since that was up to the sheriff. Petitioner said that Prifchard had given her some $20 bills, but that if they were counterfeit she did not know it. No mention of counterfeiting had been made up to that point.

On the basis of this information, Killian then asked if petitioner would mind if the agents searched her home and she replied, "No, go right ahead" (R. 58, 60, 62). Killian testified that he had just reached petitioner's home and had been admitted by her roommate when the sheriff arrived with the petitioner from the jail. Petitioner again consented to the search and showed him where her bedroom and clothes closet were located (R. 50, 55–56).[1] In the search, agent Killian seized five counterfeit $20 bills and a sweater which had been purchased at the Vogue Shop in Brunswick (R. 62, 63). After the counterfeit bills were discovered, petitioner was arrested by the federal agents and taken to the Fulton County Jail (R. 50–51, 72–73).

On the following morning (January 13, 1963) petitioner was taken to the office of the Secret Service agents in Atlanta where seven or eight photographs were taken (R. 51–52). Petitioner testified that she

[1] Petitioner's roommate testified that the officers had been searching the house about 15 or 20 minutes before petitioner's arrival (R. 148–149). Petitioner testified that the officers were already searching her house as she walked in, and that when they said they did not have a search warrant, she ordered them to get out (R. 163–164).

asked the agents not to take her picture (R. 164–165). On that same date at 2:45 p.m., a preliminary hearing was held before a United States Commissioner at Gainesville, Georgia, on the charge that petitioner had illegally possessed two or more counterfeit $20 bills. At the conclusion of the hearing, at which petitioner was represented by an attorney of her choice, the Commissioner ordered petitioner held for a grand jury investigation (R. 9–25, 53).

Subsequent to January 13, 1963, and prior to February 12, 1963 (the date on which the indictment was returned (R. 25)), agent Killian again spoke to the sales girls and showed them photographs of petitioner. He also showed the Vogue sales girls the sweater which petitioner had purchased, and they identified it as coming from their shop (R. 92–93, 95–96, 103).

Petitioner unsuccessfully moved for suppression of all evidence seized at her home and for suppression of the testimony of any witness who had been shown photographs of petitioner taken against her will (R. 2–9). None of the evidence seized in the search of petitioner's home was introduced at the trial (R. 73, 168). The sales girls identified petitioner as the woman who had passed the counterfeit bills by pointing her out in the jury's presence (R. 75, 88–89, 98, 105, 116).

ARGUMENT

1. The evidence was sufficient to show that petitioner consented to the search of her house. Valid consent to a search may be given by an accused who is in custody. *United States* v. *Mitchell*, 322 U. S. 65. In this case petitioner, while in State custody, asked

to see a federal agent. In her conversation with agent Killian at the jail, before any reference had been made to counterfeiting, she volunteered the statement that if some $20 bills Pritchard had given her were counterfeit, she did not know this. Consent to a search would be a normal part of a strategem to show her innocence.

The sweater which petitioner had purchased at the Vogue Shop with a counterfeit bill was validly seized as contraband. There was thus no impropriety in merely showing this sweater to two Vogue sales girls[2] so that they could identify it as having come from their shop, in corroboration of their previous eye-witness description of petitioner as the culprit. The sweater was not introduced in evidence at the trial.

2. There is no substance to petitioner's contention that photographs taken without her consent during a period of alleged illegal detention in violation of Rule 5(a), F.R. Crim. P., became "fruit of the poisonous tree" under *Nardone* v. *United States*, 308 U.S. 338, 341, making it improper to show them to prosecuting witnesses for the purpose of identification.

Rule 5(a) was not violated. On January 12, 1963, around midnight, petitioner was arrested on the federal charge and taken from Griffin to the Fulton County Jail in Atlanta. The photographs were taken the following morning. Petitioner was taken before the nearest available commissioner at Gainesville that

[2] Petitioner misstates the evidence in asserting that the sweater was shown to all of the clerks involved at the Brunswick shopping center (Pet. 3-4, 16). The sweater was shown only to the two Vogue sales girls (R. 92-93, 95-96, 103).

afternoon. Petitioner was arrested in an area where commissioners are not instantly available at all hours. The short interval between the arrest and arraignment did not constitute unnecessary delay under Rule 5(a) (see *Mallory* v. *United States*, 354 U.S. 449, 454, 455).

Moreover, in this case the use of the photographs would not require reversal of the conviction even if taken during a period of illegal detention. The sales girls had given the agent a detailed description of the petitioner within a few days after her purchases, and therefore could have identified her without being shown her photograph. The agent merely showed the photographs of petitioner to the sales girls for confirmation of petitioner's identity. The photographs were not used in evidence and the sales girls identified petitioner at the trial by pointing to her in the court room.[2] In these circumstances, the relationship of the photographs to the evidence introduced at the trial was too attenuated to taint it as "fruit of the poisoned tree." Cf. *Smith* v. *United States*, 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954; *Payne* v. *United States*, 294 F. 2d 723 (C.A.D.C.), certiorari denied, 368 U.S. 883.

[2] One sales girl testified that, even had she not been shown a photograph of the petitioner, there would be no doubt in her mind that petitioner was the person who had passed the counterfeit bill (R. 116).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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